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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERICK ALLEN BATTERSBY, Defendant and Appellant.	A159213 (Humboldt County Super. Ct. No. CR1900453)

Erick Allen Battersby appeals from a judgment of conviction and sentence imposed after a jury found him guilty of attempted murder, assault with a deadly weapon, and burglary. He contends the court erred in excluding certain evidence, which he claims would have shown that his victim was the aggressor in their fight. He further contends his sentence for burglary should have been stayed pursuant to Penal Code section 654. We will stay the sentence on the burglary conviction and affirm the judgment in all other respects.

I. FACTS AND PROCEDURAL HISTORY

On April 2, 2019, the Humboldt County District Attorney filed a first amended information charging Battersby with attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664/187), assault with a deadly weapon (§ 245, subd. (a)(1)), first degree burglary (§§ 459/460), and attempted mayhem (§§ 664/203).[1] The court granted Battersby's section 995 motion to set aside the attempted mayhem count. The matter proceeded to a jury trial.

A. People's Case

On December 2, 2016, victim James Minton met Lance Lorenzen, who allowed Minton to sleep on his living room couch. At approximately 11:30 p.m., Minton went to sleep.

Around 5:00 a.m. on December 3, 2016, Minton awoke, finding appellant Battersby with his arm on Minton's chest and a knife to Minton's throat. Battersby threatened Minton: "I'm going to kill you for what you've done to our family, what you've put me through." (Battersby was dating Minton's daughter, Jilene.)

With his left hand, Minton grabbed Battersby's right hand, which was holding the knife; and with his right hand, Minton grabbed Battersby's testicles. Battersby tried to gouge Minton's eye out with his left hand. Minton took the knife from Battersby and "put [Battersby] on the floor," where the two fought. Minton got up and kicked Battersby several times in the face and on the side.

Lorenzen entered the living room, grabbed Minton, and asked Minton what he was doing. Minton replied that Battersby was "that piece of shit that I've been telling you about." Lorenzen let go of Minton, grabbed

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[1] Except where otherwise indicated, all statutory references are to the Penal Code.

Battersby, and kneed him in the face. Battersby tried to tackle Lorenzen. One of Lorenzen's housemates entered the living room and saw Lorenzen straddling and punching Battersby in the face while Minton held Battersby's legs. Eventually, Lorenzen and Minton got off of Battersby and threw him out the front door.

Minton sustained a cut extending from his Adam's apple to his ear, along with abrasions to his face, a swollen eye, a bloody nose, and multiple lacerations.

B. Defense Case

Battersby testified that he first met Minton when Minton arrived unannounced at his and Jilene's house in December 2015. Minton stayed for less than a week on the couch. The next time Minton visited was Father's Day 2016, again unannounced, staying nearly a month. During this visit, Minton became aware that Battersby and Jilene were using heroin and confronted them about it. According to Battersby, Minton was "very abusive, hostile and threatening" and threatened Battersby's life more than once. Battersby asked Minton to leave, which he did after two days. Minton visited again in March or April and in September or October and allegedly threatened Battersby.

By Battersby's account, in the morning hours of December 3, 2016, Battersby and Jilene purchased and injected heroin. Around 4:00 a.m., Battersby received a phone call from Lorenzen, his cocaine dealer, and made plans to go to Lorenzen's residence around 5:45 a.m. Battersby and Jilene hung out in their car and went to a restaurant for coffee. As 5:45 a.m. approached, Battersby drove to Lorenzen's residence without Jilene. When he got there, Battersby and his dog got out of the car, and Battersby unleashed the dog inside a fenced area. Battersby followed Lorenzen to his

bedroom, where Lorenzen handed Battersby an "eight ball" bag of cocaine in exchange for $240 and a pound of pot. Battersby dumped some of the cocaine onto a mirror and cut it up with his knife, making at least four lines of cocaine, which Battersby and Lorenzen consumed.

Battersby then heard his dog barking viciously in the front yard. He left the room to check on the dog and saw a figure in front of the door. The person asked, "Where is Jilene?" Battersby recognized Minton's voice. Battersby headed for the door and tried to get around Minton, but Minton pushed Battersby back. Battersby tried to get past Minton again, but Minton hit Battersby with a hard object, knocking him to the floor. Minton started beating Battersby. At least one other person, who sounded like Lorenzen, beat him as well. Minton said, "I'm going to kill this junkie piece of shit." Battersby ran out the front door.

C. People's Rebuttal

Deputy Luke Mathieson testified that he did not find controlled substances in Lorenzen's house, and no one in the house indicated there were any. Nor did Mathieson find the $240 Battersby supposedly gave Lorenzen.

On the day of the incident, Battersby and Jilene had given Deputy Mathieson a different account of what occurred. They claimed that Battersby had gone to Lorenzen's house to ask Minton for Jilene's hand in marriage. Battersby knocked on the front door, and Minton opened it. When Battersby asked Minton for Jilene's hand in marriage, Minton responded, "Hell no, junkie chomo" and "jumped" Battersby, punching him repeatedly. However, the deputy examined Minton's hands and did not see any wounds consistent with having punched anyone.

D. Verdict and Sentence

The jury found Battersby guilty of attempted murder, assault with a deadly weapon, and first degree burglary.

The court sentenced Battersby to prison for seven years to life on the attempted murder conviction (§§ 664, subd. (a))/3046, subd. (a)). The court also imposed a four-year term for assault with a deadly weapon (count two) and a six-year term for burglary (count three), ordering those terms to be served concurrently with the indeterminate term. The term on the assault was stayed pursuant to section 654; the term on the burglary was not. This appeal followed.

II. DISCUSSION

A. Exclusion of Evidence

Battersby's defense theory was that Minton was the aggressor in their altercation. To that end, Battersby's attorney elicited from Minton on cross-examination that Minton told the prosecutor's investigator (Tom Cook, in February 2019) that he hated drugs, heroin, methamphetamine, and drug addicts such as Battersby.

Battersby's attorney then elicited Minton's acknowledgement that he wrote a letter dated April 24, 2019 (more than two years after the incident), entitled "events prior to Battersby arrest." Battersby's attorney asked Minton if he indicated in the letter that Battersby's counsel and a defense investigator contacted him in Idaho. The prosecutor objected on the ground of hearsay. Battersby's attorney rephrased his question, and Minton acknowledged that he met the attorney in Idaho. The prosecutor then objected on the ground of relevance.

Following a sidebar, and out of the presence of the jury, the court held a hearing pursuant to Evidence Code section 402 (402 hearing). The prosecutor

explained that he objected to the hearsay statements in the letter as irrelevant and potentially implicating Evidence Code section 352. Battersby's counsel responded that it was a "credibility issue." As relevant here, defense counsel ultimately urged the admission of two statements by Minton—one in the letter about him nearly being killed in an attack, the other to an investigator about having been in prior altercations with people who had guns and knives.[2]

1. Minton's Statement About Being Nearly Killed

At the 402 hearing, Battersby's attorney questioned Minton regarding a statement in his letter that he had almost been killed in Idaho about a week before Battersby's trial was scheduled to begin. Minton explained that he was "attacked in a pub" by two individuals during "a neighborhood meeting about the crime in the neighborhood." He sustained a broken back and was unable to appear for Battersby's trial, so the trial was continued, and the defense counsel and his investigator showed up to talk to him a week later. The prosecutor objected on the ground of relevance. Battersby's attorney retorted, "I made my point." The court ruled the evidence inadmissible.

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[2] Battersby contends the evidence was admissible under Evidence Code section 1101, subdivision (c) (allowing evidence of prior acts to attack credibility) and Evidence Code section 1103, subdivision (a) (allowing evidence of prior acts of the crime victim to show the victim's propensity for violence). Battersby did not mention these statutes in the trial court, so the People argue he forfeited his arguments on appeal. But to preserve a challenge to the exclusion of evidence, Evidence Code section 354, subdivision (a) requires only that "the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." Defense counsel met this requirement by telling the court that the evidence was relevant for "credibility" and to show that Minton was the aggressor.

The court did not abuse its discretion. While Battersby argues that the evidence showed Minton was the initial aggressor in their fight, there was no indication that Minton had been the initial aggressor in the Idaho bar incident. To the contrary, the evidence was that Minton *was "attacked" by* two other individuals. Nor was there evidence that Minton's attackers were drug addicts. It was reasonable for the court to conclude that being attacked in April 2019 by unidentified assailants in Idaho did not reflect on Minton's credibility or tend to show that he attacked Battersby months earlier. [3]

2. Statement to Investigator About Prior Altercations

As the 402 hearing continued, Battersby's lawyer asked Minton about a statement Minton made to the prosecutor's investigator: "I was not scared; I've been down that road before; *I've got five bullet holes in me; I've dealt with plenty of altercations with people with guns and knives*." (Italics added.) Minton admitted saying that to the investigator and explained: "Told them I got shot five times because of a piece of shit like him. And they were robbing people back—I told Mr. Cook [the investigator] that I had been involved and seen people like this and had dealt with them and got shot because of the kind of people they were. They were going around sticking guns in little kids mouths, robbing their parents of their marijuana, their money; and when they ran across me because of who I was they just shot me five times because they were trying to rob me for everything I had or they thought I had on me." Minton testified that the incident when he was shot five times occurred in 1982.

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[3] The hearing next involved questioning and arguments as to the admissibility of evidence that Minton was a federal fugitive in the 1980's. The court ruled the evidence inadmissible on the ground of relevance and Evidence Code section 352. That ruling is not challenged on appeal.

The prosecutor argued that the shooting incident was too remote in time. Battersby's lawyer countered that Minton said "plenty of altercations"—not just the shooting in 1982—and argued that the evidence showed Minton had the "capacity to be the aggressor" against Battersby. Defense counsel contended that "[a]n aggressor, an aggressive individual would have that signature history of" dealing with people with guns and knives. Defense counsel ultimately agreed that the shooting in 1982 was *not* relevant but reminded the court that Minton had admitted nearly being killed recently in Idaho.

The court ruled that the evidence was inadmissible. The court explained: "Too remote. It's not going to come in. And the opportunity was, you know, was a statement made referring to something that occurred in 1980; there may have been other incidences, but the only one I know about is one about 1980. That's too remote."

The court did not abuse its discretion. Minton was shot by someone trying to rob him more than 35 years before he and Battersby fought. The court could reasonably conclude that the incident was irrelevant to whether Minton was the aggressor with Battersby. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448, fn. 4 ["At some point in time, . . . evidence of the victim's character becomes too remote to have any probative value and this becomes irrelevant."].) Indeed, defense counsel *conceded* that the shooting incident was irrelevant. And although Minton had referred to "plenty" of altercations with people with guns and knives, defense counsel did not elicit the time or details of any altercation other than the shooting decades ago. Battersby points to the more recent incident in Idaho, but there was no indication that the Idaho incident involved guns or knives, so there is no reason to believe it was one of the "plenty" of altercations Minton was describing.

Battersby insists the evidence of Minton's past altercations was relevant because it showed that "Minton viewed himself as something of a vigilante. . . . [¶] who stands up to 'piece[s] of shit.' " He further argues that remote incidents may be probative if they are relevant to a person's current world view, and here "Minton brought up the past incident in describing his current character—someone who has 'dealt with' this type of situation before." But Minton's recounting what he had "dealt with" was merely a statement of how he acted in response to what others did to him in the past, as an explanation for why he was not scared. It did not suggest he was a vigilante or considered himself to be one. While Battersby sought to introduce the evidence to *suggest* Minton had a current character for violence, the altercations from decades earlier were not shown to involve any aggression or violence by *Minton*. Battersby fails to demonstrate an abuse of discretion in excluding the evidence.[4]

B. Section 654

The trial court imposed an aggravated six-year term on Battersby's first degree burglary conviction and ordered that the term be served concurrently with the indeterminate life term imposed on the attempted

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[4] Even if the evidence had some probative value, it would be reasonable to conclude that it was substantially outweighed by the probability the evidence would necessitate undue consumption of time in presenting and explaining the circumstances of the altercations, and it would create a substantial danger of undue prejudice, confusion of the issues, and misleading the jury. (Evid. Code, § 352.) We also note that the defense *was* allowed to elicit evidence directly from Minton that he hated drugs, drug addicts, and Battersby, who had involved Minton's daughter with heroin. The jury did not find Minton to be the aggressor notwithstanding that evidence, and we see no reasonable probability that the jury would have concluded he was the aggressor if they had also known he was beaten up by some people in Idaho and shot by someone else nearly four decades earlier.

murder conviction. Battersby argues that section 654 required the court to stay the term imposed on the burglary count. Respondent agrees.

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The purpose of this statute is "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 550–551.)

Here, as analyzed by respondent, the jury found Battersby guilty of first degree burglary and therefore rejected Battersby's claim that he was invited to Lorenzen's house to buy drugs. Accordingly, Battersby's only felonious intent or objective to enter Lorenzen's house was to assault and kill Minton. Because the intent underlying the burglary conviction was the same as the intent underlying the attempted murder conviction, the term imposed for burglary should have been stayed under section 654. "Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences." (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

In light of the parties' agreement, we will order that the term for Battersby's burglary conviction be stayed.

III. DISPOSITION

The sentence on Battersby's conviction on count 3 for burglary is stayed pursuant to Penal Code section 654, and the abstract of judgment is ordered amended in that regard. The judgment is affirmed in all other respects.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BURNS, J.

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